

Luong (Migration) [2018] AATA 553 (6 March 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Sammi Luong

VISA APPLICANT: Mr The Huy Ly

CASE NUMBER: 1618420

DIBP REFERENCE(S): OSF2015/071868

MEMBER: Hugh Sanderson

DATE: 6 March 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the visa application to the Minister for reconsideration, with the direction that the application be taken also to be an application for:

- a Partner (Migrant) (Class BC) visa; and
- a Partner (Provisional) (Class UF) visa

that is made on the day the visa application is remitted to the Minister.

Statement made on 06 March 2018 at 1:39pm

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TO) – Subclass 300 (Prospective Marriage) – Visa applicant and Review applicant are married – Eligible for Partner (Migrant) (Class BC) visa and Partner (Provisional) (Class UF) – Remitted to the Minister for reconsideration

LEGISLATION

Marriage Act 1961 ss 12, 88E

Migration Act 1958, s 65

Migration Regulations 1994, rr 2.08E

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 17 December 2015 as the prospective spouse of their sponsor, the review applicant. The delegate refused to grant the visa on 11 October 2016.
3. The review applicant applied to the Tribunal on 4 November 2016 for review of the delegate's decision. The Tribunal has been advised that the parties are now married.

CONSIDERATION OF CLAIMS AND EVIDENCE

4. Where an application has been made for review of a decision to refuse to grant a Prospective Marriage visa, and the visa applicant validly marries the sponsor after that decision was made and notifies the Tribunal of the marriage before the review application has been finally determined, r.2.08E of the Migration Regulations 1994 (the Regulations) requires the Tribunal to remit the visa application to the Minister for reconsideration with the direction that the application be taken also to be an application for a Partner (Migrant) (Class BC) and a Partner (Provisional) (Class UF) visa. This allows the now married applicant to be assessed for a spouse visa rather than a prospective marriage visa.
5. For the purpose of deciding whether a marriage is to be recognised as valid for the purposes of the Act, s.12 of the Act provides that Part VA of the *Marriage Act 1961* (the Marriage Act) applies as if s.88E of the Marriage Act were omitted. Subject to certain exceptions not relevant to the present matter, foreign marriages recognised under local civil law in the country where they are solemnized will be recognised in Australia under Part VA of the Marriage Act. The exceptions relate to whether either party was already married, whether the parties were of marriageable age at the time of the marriage, whether the parties are within a prohibited relationship, whether the consent of each party was real consent, and whether the marriage is voidable under the local law.
6. In the present case, the review applicant informed the Tribunal that she and the visa applicant were married in Vietnam on 13 October 2016. The Tribunal has been provided with evidence of the marriage in the form of the Vietnamese Marriage Certificate and translation. There is nothing to indicate that the marriage between the parties is not valid. It is noted that these documents were only provided to the Tribunal on 6 March 2018.
7. On the evidence before it, the Tribunal finds that the visa applicant applied for a Prospective Marriage (Temporary) (Class TO) visa, the Minister refused to grant the visa, and the sponsor of the visa applicant applied for review of that decision in accordance with the Act.
8. The Tribunal is also satisfied that in the period after the delegate's decision was made and before the review application was finally determined the visa applicant married the prospective spouse, the review applicant notified the Tribunal of the marriage, and the marriage is recognised as valid for the purposes of the Act. Therefore, the requirements of r.2.08E(2A) are satisfied, and in accordance with r.2.08E(2B) the application must be remitted to the Minister for reconsideration.

9. The parties have provided extensive material to the Tribunal in support of their application that they are in a genuine and continuing relationship. The applicant should provide this information and any further documents to the Department to support their claim that they are in a genuine and continuing and exclusive relationship with each other.

DECISION

10. The Tribunal remits the visa application to the Minister for reconsideration, with the direction that the application be taken also to be an application for:
- a Partner (Migrant) (Class BC) visa; and
 - a Partner (Provisional) (Class UF) visa
11. that is made on the day that the visa application is remitted to the Minister.

Hugh Sanderson
Member